

Applicant identifies claims 2-9 and 21-24 as included within Species I pertaining to injection of a material to stabilize tissue.

Species II.

Applicant identifies claims 11-13, 16-18 as corresponding with Species II for mechanically securing a portion of the pharyngeal wall to an underlying structure. As to these, claims 11 and 16 are generic as to Subspecies I and II and would cover both of suturing, adhesives as well as other mechanical securing.

ELECTION

Applicant hereby advises the Examiner that Applicant elects to proceed with Species II in the event no generic claim is finally held to be allowable.

Traverse of Restriction Requirement

Applicant respectfully submits that the restriction requirement is inappropriate in the present instance. Applicant acknowledges that the Examiner is not limited to making a restriction requirement prior to an action on the merits. However, Applicant notes that the Examiner has already indicated that claims of all Species are allowable. Specifically, the Examiner has already examined and has already indicated as allowable (subject to presenting the claims in independent format), claims 2-9, 11-13, 17, 18 and 21-24.

Applicant also traverses the Examiner's statement that claim 1 is generic. While the Applicant agrees that claim 1 is generic, Applicant also admits that claims 10, 14, 15 and 19-20 are not limited specifically to either of the identifying features of Species I or II and, are therefore generic to both of Species I and II.

Applicant respectfully submits that the restriction requirement should be withdrawn and that claims 2-9, 11-13, 17, 18 and 21-24 should be indicated as allowable for the reasons given in the December 28, 2004 Office Action indicating allowability of these claims if written in independent format. Further, Applicant respectfully submits that all the remaining claims are allowable for the reasons given in the March 11, 2005 Response submitted by the Applicant.

Burden of Late Restriction

Applicant notes that the Applicant will suffer a significant burden by reason of the restriction requirement made at this late date. The Applicant has relied upon the Examiner's indication that certain claims would be allowable if written in independent format. Applicant has presented those claims in independent format. By reason of re-writing these claims in independent format as suggested by the Examiner, the Applicant has suffered a significant increase in Patent Office filing fees. Namely, by presenting these claims in independent format the Applicant has incurred a cost of \$800.00 which was paid with the filing of the March 11, 2005 Amendment. Applicant also respectfully submits there is no serious burden on the Office if restriction is not required within the meaning of MPEP § 811.

Ambiguity as to Allowability of Generic Claims

As noted, Applicant has indicated that Applicant believes claim 20 is generic in that claim 20 and its independent claim 19 do not recite treatment of tissue with either an injectible tissue stabilizer or mechanically securing a portion of a pharyngeal wall to underlying structure. There was ambiguity in the December 28, 2004 Office Action as to the allowability of claim 20. Namely, in the December 28, 2004 Office Action, page 2, paragraph 2, claim 20 was rejected. However, in paragraph 4 of that Office Action, claim 20 was indicated as allowable if written in independent format. Applicant notes that no other claims depend from claim 20.

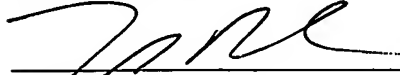
Summation

Applicant elects to proceed with Species II, which includes claims 11-13, 16-18 and 21-24. Applicant respectfully traverses the rejection on the basis that the rejection is unduly burdensome after the first Office Action in which multiple claims of both Species were indicated as allowable subject to presenting the claims in independent format. Further, Applicant has incurred a significant burden of an \$800.00 additional filing fee by reason of complying with the Examiner's suggestions in a December 28, 2004 Office Action and re-writing the claims in independent format. Accordingly, withdrawal of the restriction requirement is respectfully solicited.

Respectfully submitted,

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